PATERSON CANDY (MALAYSIA) SDN. BHD. v. MINISTER FOR LABOUR AND MANPOWER & ORS.

[O.C.J. (Harun J.) January 24 and September 23, 1978]
[Kuala Lumpur — Originating Motion No. 87 of 1977]

Administrative Law — Certiorari — Application to quash decision of Minister — Claim for recognition of trade union — Failure to accord recognition — Opinion by Registrar of Trade Unions that union entitled to represent workers — Contention by employer that nature of its business did not come within scope of membership of union — Membership rules of union not considered — Decision of Minister made in error — Trade Unions Ordinance, 1959, ss. 15(1) and 17(1) — Industrial Relations Act, 1967, ss. 9, 11 and 12.

Trade Union — Claim for recognition by — Objection by company — Minister's decision erroneous — Application to quash — Trade Unions Ordinance, 1959, ss. 15(1) & 17(1) — Industrial Relations Act, 1967, ss. 9, 11 & 12.

In this case the applicant's company had been served with a claim for recognition by the Machinery Manufacturing Employees Union (MMEU). In response to an inquiry by the Company the Registrar of Trade Unions stated that the MMEU was entitled to represent the workers in the Company. The Company tried to explain that its business was that of being agents for certain machines and not manufacturers and therefore the nature of their business did not come within the scope of the membership of the MMEU. The Registrar of Trade Unions however refused to alter his decision. Subsequently the MMEU reported to the Minister that the Company had failed to accord recognition and asked for the Minister's decision. The Minister eventually decided that the Company should accord recognition to the MMEU. The Company thereupon applied for an order of *certiorari* to quash the decision of the Minister.

Held: (1) under section 9(5) of the Industrial Relations Act, it is not enough that the Minister should satisfy himself that a substantial number of workers are members of the union claiming recognition but he should also satisfy himself in the circumstances of the case that the membership rules of the union in fact and in law permit enrolment of the Company's employees since that was the substance of the dispute regarding recognition;

(2) in this case the membership rules of the MMEU did not permit enrolment of the Company's employees and the Minister's decision was therefore in breach of section 15(1)(b)(v) of the Trade Unions Ordinance;

(3) at the time of the Minister's decision the majority of the Company's employees were members of the National Union of Commercial Workers which had been awarded recognition by the Company. The decision of the Minister was therefore contrary to section 11 of the Industrial Relations Act, 1967.

Cases referred to:-

(1) *Attorney-General, Malaysia* v. *Chemical Workers Union of Malaysia & Anor.* [1971] 1 M.L.J. 38.

(2) *Foh Hup Omnibus Co. Bhd.* v. *Minister of Labour and Manpower & Anor.* [1973] 2 M.L.J. 38.

ORIGINATING MOTION.

C.V. Das for the applicants.

Stanley Isaacs for the 1st and 2nd respondents.

D.P. Xavier for the 3rd respondent.

Harun J.: This is an application for an Order of *Certiorari* to quash a decision made by the Minister of Labour and Manpower. The facts are as follows:

By letter dated November 7, 1973 the applicant Company was served with a claim for recognition by the National Union of Commercial Workers (NUCW) in respect of its employees under section 8 (now section 9) of the Industrial Relations Act, 1967. On November 12, 1973, the Company wrote to the Director-General of Industrial Relations for advice as to whether it should accord such recognition. On November 15, 1973, the Director-General of Industrial Relations wrote to the Company that the matter had been referred to the Registrar of Trade Unions for a decision. By letter of November 28, 1973 the Registrar of Trade Unions informed the NUCW that it could not claim recognition on the grounds that:

"Paterson Candy (M) Sdn. Berhad are water-treatment specialists and contractors. The company specialises in the investigation, design, manufacturing, civil construction, testing and commissioning of complete water works installations, boiler and industrial water treatment and filtration plant. As such, the substantial part of the operations of the company involves technical expertise combined with the construction and installation of water treatment facilities, generally;"

and therefore the nature of the business of the Company did not come within the scope of the membership of the NUCW. The Registrar then proceeded to forbid the NUCW to enrol as its members the employees of the Company. The NUCW by letter of December 4, 1973 protested on the grounds that the Company is only an agent for certain machines and not manufacturers but the Registrar of Trade Unions declined to alter his decision by letter of December 5, 1973.

By letter of March 2, 1976 the Company was served with a claim for recognition by the Machinery Manufacturing Employees Union (MMEU). In response to a letter dated March 22, 1976 from the Company, the Registrar of Trade Unions by letter of April 10, 1976 stated that the MMEU was entitled to represent the workers in the Company. By letter of April 22, 1976 the Company explained in detail to the Registrar of Trade Unions that the nature of its business did not come within the scope of the membership of the MMEU. In reply the Registrar of Trade Unions by letter of May 20, 1976 stated that he could not alter his decision given on April 10, 1976. He also drew the attention of the Company that he had investigated the matter in 1973 when the NUCW claimed recognition including a visit to the premises of the Company.

On June 1, 1976 the MMEU reported to the Minister under section 8(4) (now section 9(4) of the Industrial Relations Act), to the effect that the Company had failed to accord recognition and asked for the Minister's decision. A copy of this letter was also sent to the Company. By letter of June 7, 1976, the Company explained to the Minister why it could not accord recognition adding that the Company belonged to a group which had already recognised five trade unions. On November 17, 1976 the Managing Director of the Company asked the Minister for an interview. In reply, the Secretary-General of the Ministry by letter of December 14, 1976 stated that as the Company had lodged its appeal after the expiry of the 30 days period it contravened section 17 of the Trade Unions Ordinance, 1959 and he regretted that the Minister could not reconsider the appeal. On January 18, 1977 the Director-General of Industrial Relations wrote to the Company that a membership check by the Registrar of Trade Unions had disclosed that 62.5% of the employees of the Company had become members of the MMEU and advised it to recognise the

Union. By letter of January 22, 1977 the Company said it could not recognise the Union for reasons stated earlier and appealed to the Director-General of Industrial Relations to initiate an enquiry amongst its employees to confirm actual membership of the Union. On February 3, 1977, the Director-General of Industrial Relations in reply stated that as the Registrar of Trade Unions had decided that as the MMEU is suitable to represent its employees the question of suitability of representation was no longer relevant. He declined an inquiry on the grounds that an investigation of the membership had been carried out. Finally he said that as the matter could not be resolved he was referring it to the Minister under section 9(5) of the Industrial Relations Act.

In the meantime, on January 6, 1977, 41 employees of the Company wrote to the NUCW stating that the MMEU could not obtain recognition from the Company and requested NUCW to enrol them as members and to seek recognition from the Company. On January 7, 1977, 27 employees of the Company resigned membership of the MMEU. During January 1977, 52 employees became members of the NUCW. The Company has 100 employees. By letter of February 15, 1977, the Company was again served with a claim for recognition by the NUCW. On February 26, 1977, the Company wrote to the Director-General of Industrial Relations for advice on this claim. On March 10, 1977, the Director-General of Industrial Relations stated that the Registrar of Trade Unions had previously decided in 1973 that the NUCW was not a suitable union for recognition by the Company but in any event he was referring the matter to the Registrar of Trade Unions. On March 14, 1977, the Company accorded recognition to the NUCW on the grounds that the nature of its business had changed since 1973.

On March 24, 1977, the Director-General of Industrial Relations wrote to the Company stating:

"(i) The NUCW is not permitted to represent the employees of the company; and

(ii) The Minister had decided under section 9(5) of the Industrial Relations Act:

'That Paterson Candy (Malaysia) Sdn. Bhd. shall accord recognition to the Machinery Manufacturing Employees' Union of 19 Jalan Barat, Petaling Jaya'."

It is against this decision of the Minister that this application is being made.

The Trade Unions Ordinance, 1959 provides, *inter alia*, that every trade union shall be registered (section 8) and apart from certain restrictions regarding membership of minors and students, the membership of a trade union shall be in accordance with the rules of that union (section 26) which, however, is subject to section 2(1) which reads:

"'Trade union'... means any association or combination of workmen...' being workmen... whose place of work is in the States of Malaya....

(a) within any particular trade, occupation or industry or within any *similar* trades, occupations or industries;"

Section 2(2) "For the purposes of the definition of "trade union" in subsection (1), ... "similar" means similar in the opinion of the Registrar. Section 3 provides for the appointment of a Registrar "who shall be responsible for the due performance of the duties and functions assigned to the Registrar under the Ordinance." One of those powers is that he may register or refuse to register a trade union if he is satisfied that the rules of the union conflict with any of the provisions of the Ordinance: section 12. Or he may cancel or withdraw registration if he is satisfied "that the trade union has contravened any provision of this Ordinance or of any regulations made thereunder, or *of any of its rules*, or allowed any rule to continue in force which is inconsistent with any such provision, or has rescinded any rule providing for any matter for which provision is required by section 38: section 15(1)(b)(v). In the instant case the membership rules of the two unions are as follows:

"National Union of Commercial Workers:

"To secure the complete organisation of all workers employed in such commercial concerns whose principal business activity is the wholesale or retail trading i.e. the buying, selling or re-selling (sale without transformation) of goods and merchandise or the providing of commercial services associated with such activity e.g. insurance, brokerage, credit agencies, industrial loan and credit, co-operative loan and credit under-writing, secretarial and accounting services, warehousing, security exchange and exchange clearing and other financial institutions and transactions and real estate excluding Exchange Banks in West Malaysia and to promote the industrial, social and intellectual interests of its members."

Machinery Manufacturing Employees Union:

"Manufacture of Agricultural Machinery and Implements which includes manufacture of power lawn mowers.

Manufacture of Industrial Machinery and Parts which includes manufacture of mining and manufacturing machinery of all sorts, such as dredges, ore conveyors, pumps, mangles, bandsaws, presses, etc., tractors and conveyors; diesel and other engines, except for transport equipment; machine tools and mechanical precision measuring equipment; industrial heating and cooking machinery; drills; cutting and welding equipment; elevators; power-driven hand tools; lifting and hoisting machinery; and parts and spares for industrial machinery. (Does not include electrical industrial equipment, such as motors or generating equipment).

General Engineering and Machinery Repair Shops which includes establishments which provide agricultural and industrial machinery repair services only i.e. which do not make parts from, purchased materials. (Does not include electrical machinery repairs).

Manufacture and Repair of Office, Commercial and Household Machinery which includes manufacture and repair of typewriters, dictaphones, calculators, cash registers, accounting machines, etc.; dishwashing, laundry and ironing machinery, commercial and household; sewing machines, commercial and household; coin operated amusement and vending machines; petrol pumps."

In general, the Trade Unions Ordinance is concerned with the organisation, management and conduct of trade unions and the powers of the Registrar in connection therewith. The Industrial Relations Act, 1967, on the other hand, provides "for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally deal with trade disputes and matters arising therefrom." The relevant provisions of the latter Act that concern us are:

"Section 9(2) A trade union of workmen may serve on an employer or on a trade union of employers in writing a claim for recognition in respect of the workmen or any class of workmen employed by such employer or by the members of such trade union of employers.

(3) An employer or a trade union of employers upon whom a claim for recognition has been served shall, within twenty-one days after the service of the claim, either accord recogni-

tion or, if recognition is not accorded, notify the trade union of workmen concerned in writing the grounds therefor.

(4) Upon receipt of a notification under subsection (3) or where an employer or a trade union of employers has failed to comply with subsection (3), the trade union of workmen may report the matter in writing to the Minister.

(5) The Minister, upon receipt of a report under subsection (4), may take such steps or make such inquiries as may be necessary or expedient to resolve the matter or to give a decision thereon; where the Minister decides that recognition is to be accorded, such recognition shall be deemed to be accorded by the employer or trade union of employers concerned, as the case may be, as from the date of service of the Minister's decision on the employer or trade union of employers, as the case may be; a decision of the Minister under this subsection may include a decision as to who are workmen employed in a managerial, executive, confidential or security capacity; a decision of the Minister under this section shall be final and shall not be questioned in any court.

(6) Where any step taken or any inquiry made in respect of a report to the Minister under subsection (4) is taken or made by or under the direction of the Director General it shall be deemed to be a step taken or an inquiry made by the Minister under subsection (5).

Section 11. Where a trade union has been accorded recognition in respect of any workman or class of workmen whether by a decision of the Minister or otherwise no other trade union shall make any claim for recognition in respect of the same workman or class of workmen unless a period of two years has elapsed after such recognition has been accorded or the trade union which has been accorded recognition is no longer in existence.

Section 12. Where the Minister has decided that a trade union of workmen shall not be accorded recognition, such trade union shall not make any further claim for recognition until three months have elapsed after the decision."

The grounds for this application may be summarised as follows:

The Minister was wrong in law and had acted in excess of jurisdiction under section 9(5) of the Industrial Relations Act:

1. In ordering the applicants to compulsorily accord recognition to the MMEU as the appropriate union to represent the employees of the applicants in that the said union could not accept its employees as members.
2. In that at the material time the employees of the applicants belonged to the NUCW which had been accorded recognition by the applicants.
3. In that he was influenced by or held himself bound by the purported ruling of the Registrar of Trade Unions under section 2(2) of the Trade Unions Ordinance that the MMEU was the appropriate union to represent the employees of the applicants and that the said Registrar's ruling was a nullity in law.
4. In that he took into consideration the rejection of the applicants' purported appeal against the ruling of the Registrar of Trade Unions as not having been made within one month of the Registrar's ruling as required by section 17(1) of the Trade Unions Ordinance as the Registrar had no powers under section 2(2) of the said Ordinance to make such a ruling.

The Registry of Trade Unions and the Directorate of Industrial Relations are two separate Government Departments but both come within the portfolio of the Minister of Labour. The Minister in making a decision under section 9(5) of the Industrial Relations Act, "may make such enquiries as may be necessary or expedient ... to give a decision thereon;" and in doing so in this case called upon the Registrar of Trade Unions to make a membership check. I am of the view that the course taken by the Minister is a matter of administrative convenience only since the Registrar has access to records of trade union membership. It is true that by section 2(2) of the Trade Unions Ordinance the Registrar has powers to declare similarity of trade, occupation or industry but these powers may only be exercised under and in relation to the Trade Unions Ordinance and does not extend to disputes on the question of recognition of a trade union under the Industrial Relations Act, 1967: *Attorney-General Malaysia* v. *Chemical Workers' Union of Malaya & Anor.*[1] Be that as it may, the Minister was entitled to rely on the factual information given by the Registrar that in July 1976 62.5% of the applicants' employees were registered members of the MMEU: *Foh Hup Omnibus Co. Bhd.* v. *Minister of Labour and Manpower & Anor.*[2] It does not follow, however, that these employees were properly enrolled as members in accordance with the membership rules of that union. This was the issue which the Minister had to decide in this case because it was the applicants' contention all along that the reason for not recognising the MMEU was that its employees were enrolled by the union in breach of its membership rules. In arriving at his decision, the Minister said he "had to be satisfied that the 3rd respondent Union (MMEU) did in fact represent a substantial number of workers of the applicant Company before it could be accorded recognition under section 9(5) of the Industrial Relations Act". He however, went on to say that under that section he "was not required to consider the eligibility or otherwise of the 3rd respondent Union to represent the employees of the applicant Company as there is no provision whatsoever under the Industrial Relations Act, 1967 for such a consideration to be made. The question of eligibility of the MMEU to represent workers of the applicant Company is determined under section 2(2) of the Trade Unions Ordinance, 1959 by the Registrar of Trade Unions and in the event of an appeal against such decision of the Registrar by me under section 17(1) of the Ordinance". Further at the time of making his decisions "the question of the eligibility of the 3rd respondent Union (MMEU) to represent employees of the applicant Company had been well settled".

In my view the Minister is in error in law and in fact. He is in error in law with regard to the interpretation of his duties under section 9(5) of the Industrial Relations Act. It is not enough that he should satisfy himself that a substantial number of workers are members of the union claiming recognition but he should also satisfy himself in the circumstances of this case that the membership rules of the union in fact and in law permit enrolment of the applicants' employees since that was the substance of the dispute regarding recognition. Nowhere in the affidavits of the Minister; the Director-General of Industrial Relations or even the Registrar of Trade Unions is any mention made that the membership rules of the MMEU were considered. To this day we do not know what in the considered view of the Minister and his officials

is the category of membership of the applicants' employees in the MMEU. I have anxiously searched the membership rules of the MMEU and can find no description of workmen therein or 'similar' thereto that can apply to the applicants' employees. The Minister's decision, therefore, is in breach of the membership rules of the MMEU and consequently in breach of section 15(1)(b)(v) of the Trade Unions Ordinance. It is said that the applicants should have appealed within the prescribed time against the Registrar's opinion under section 17 of the Trade Unions Ordinance. There is no merit in this argument. In the first place, the Registrar's opinion is irrelevant in a dispute concerning recognition under section 9(5) of the Industrial Relations Act and in any event an employer has no right of appeal under the Trade Unions Ordinance against the opinion of the Registrar under section 2(2) since such an opinion could only be made on a matter between the Registrar and the trade union. This is so even if the employer (as the applicants did in this case) asked for the advice of the Registrar whether a particular trade union could represent its employees. The employer is not bound by the Registrar's advice and if he does not accept the advice (as happened here) the employer's remedy is not to accord recognition. This is what the applicants did and in my opinion rightly so. In the circumstance of this case, an appeal under section 17 of the Trade Unions Ordinance would arise if the Registrar held the view that the MMEU should not have enrolled the applicants' employees on the grounds of disimilarity and proposed to cancel the registration of the union under section 15. In such a case it is for the MMEU to appeal against the Registrar's opinion. It will be contrary to the principles of the trade union movement if an employer (outsider) was to be involved in such a dispute with a right of appeal.

The Minister's decision was made on March 24, 1977. By then the majority of the applicants' employees had resigned from the MMEU and joined the NUCW. Further, the applicants had accorded recognition to the NUCW. It is not for me to say whether the NUCW is the appropriate union to represent the applicants' employees nor whether the applicants should have accorded recognition since these issues are not before the court. But the fact remains that at the time of the Minister's decision, the majority of the applicants' employees were members of the NUCW which had been accorded recognition by the applicants. The Minister is, therefore, in error of law since such a decision is contrary to section 11 of the Industrial Relations Act.

For these reasons, I find that the Minister's decision is erroneous in points of law and fact on the face of the record and I accordingly allowed the application with costs to be paid to the applicants by the 1st and 2nd respondents.

Application allowed.

Solicitors: *Shook Lin & Bok; Xavier & Vadiveloo.*

THE BAR COMMITTEE OF PAHANG v. JOSEPH AU KONG WENG

[O.C.J. (Abdul Razak J.) January 26, 1979]

[Kuantan — Originating Notice of Motion No. 3 of 1979]

Legal Profession — Advocate and solicitor — Applicant sought to bar respondent from practising as such — Objection by respondent that applicant had no locus standi — Legal Profession Act, 1976, ss. 36(1), 41(1) & (2), 57(e) & (j), 73(ii).

Locus standi — Whether Bar Committee of Pahang had locus standi to act on its own behalf in legal proceedings — Meaning and intention of Legal Profession Act 1976 — Legal Profession Act, 1976, ss. 36(1), 41(1) & (2), 57(e) & (j), 73(ii).

The applicant in this case sought to bar the respondent, an advocate and solicitor and member of the Pahang Bar from practising as an advocate and solicitor as he was an unauthorised person within the meaning of section 36(1) of the Legal Profession Act 1976. A preliminary objection was raised by the respondent to set aside the application on the ground that the Bar Committee had no *locus standi* but only the Bar Council had.

Held: (1) the right to sue or be sued in so far as the conduct of the members of the Malaysian Bar and all matters pertaining to it are concerned is that of the Malaysian Bar Council only and not the Bar Committee;

(2) the action of the Bar Committee clearly was not related to the Bar Council and therefore for present purposes it had no *locus standi.*

ORIGINATING NOTICE OF MOTION.

S. Sivasubramanian for the applicant.

Joseph Au Kong Weng for the respondent.

Cur. Adv. Vult.

Abdul Razak J.: There has been an objection taken in this application to say that the applicant the Bar Committee Pahang has no *locus standi* but the Bar Council has. The Bar Committee of Pahang is seeking to bar the respondent an advocate and solicitor and member of the Pahang Bar from practising as an advocate and solicitor as he is an unauthorised person within the meaning of section 36(1) of the Legal Profession Act, 1976. They seek a declaration to that effect. The application was met at the hearing by a preliminary objection by the respondent to set it aside for the reason I have just stated. The respondent also says that the application has not shown any merit because the affidavit supposedly in support is inadmissible being sworn before the originating motion was filed. I do not think for the reasons which I shall state I need to deal with this point.

It would appear to me therefore that if the preliminary objection succeeds the application and all the relief set out under it, will also, for the time being at least, fall to the ground. I will explain in clearer terms what this in effect means.

The contention of the respondent was that the Bar Council and not the Bar Committee is the person with the capacity or authority to sue in this matter and in all cases. In this respect I was referred to section 41(1) and (2) of the Act for this authority. Section 41(1) reads —

"41(1) There is established a body corporate to be called the 'Malaysian Bar'."

Sub-section (2) reads —

"41(2) The Malaysian Bar shall be a body corporate with perpetual succession and a common seal, and with power sub-